

Operating Engineers, Local Union 501, International Union of Operating Engineers, AFL-CIO (California Milk Producers) and Vince Lignowski. Case 21-CB-10538

March 9, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND RAUDABAUGH

On September 27, 1991, Administrative Law Judge Earledean V.S. Robbins issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions,¹ to modify the remedy,² and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Operating Engineers, Local Union 501, International Union of Operating Engineers, AFL-CIO, Los Angeles, California, its officers, agents, and representatives, shall take the action set forth in the Order.

¹We agree with the judge's finding that the Respondent unlawfully sought employee Lignowski's discharge for nonpayment of a reinstatement fee that included back dues covering a period when Lignowski did not work under a union-security clause requiring payment of dues as a condition of employment. *Teamsters Local 439 (Shippers Imperial)*, 281 NLRB 255, 258 (1986).

²Interest is to be computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Glen C. Shults, Esq., for the General Counsel.
Abe F. Levy, Esq. (Levy, Goldman and Levy), of Los Angeles, California, for the Respondent.

DECISION

STATEMENT OF THE CASE

EARLEDEAN V.S. ROBBINS, Administrative Law Judge. This case was heard before me in Los Angeles, California, on March 13, 1990. The charge was filed by Vince Lignowski, an individual (Lignowski), and served on Operating Engineers, Local Union 501, International Union of Operating Engineers, AFL-CIO (Respondent) on May 19, 1989. The complaint, which issued on September 29, 1989, alleges that in breach of its fiduciary duty to Lignowski Respondent requested that California Milk Producers terminate Lignowski at a time when Respondent had failed to give accurate and

reasonable notice to Lignowski of his indebtedness and delinquency in reinitiation fees payment and without affording him adequate opportunity to make payment of the delinquencies.

On the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the posthearing briefs filed by the parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

At all times material, California Milk Producers (CMP) has been engaged in the business of milk marketing with a facility in Artesia, California. CMP annually, in the normal course and conduct of its business operations, purchases and receives materials valued in excess of \$50,000 directly from suppliers located outside the State of California.

The complaint alleges, Respondent admits, and I find that the employer is, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

The complaint alleges, Respondent admits, and I find that at all times material Respondent has been a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Facts

The facts are largely undisputed. CMP and Respondent were signatory to a collective-bargaining agreement effective from June 1, 1986, through May 31, 1989, which contained a union-security provision that required bargaining unit employees, on the 31st day following the commencement of their employment, to become and thereafter remain members in good standing of the Union. Although the agreement does not contain a dues-checkoff provision, CMP has followed a practice of deducting union dues and fees from the pay of any unit employee who signed a letter requesting that this be done.

Lignowski joined Respondent on July 26, 1983, at which time he paid the required initiation fee, and thereafter, unsuccessfully attempted to secure work through Respondent's hiring hall. In March 1984 he obtained a job in a unit which was not represented by Respondent. Although he never obtained a withdrawal card from Respondent, he failed to pay the union dues required to maintain his status as a member in good standing of Respondent.

On April 26, 1988, Lignowski was hired by CMP as a maintenance engineer in the bargaining unit covered by CMP's agreement with Respondent. On that same date he signed a letter requesting CMP to deduct any amount owed to Respondent automatically from his payroll check beginning with his third paycheck. Thereafter, CMP deducted, and forwarded to Respondent, \$36.50 from Lignowski's paycheck for the pay periods ending 5/28/88 and 6/25/88 and \$37 from each paycheck for the pay periods ending 7/23/88, 8/20/88, 9/17/88, 10/15/88, 11/16/88, 12/27/88, 1/21/89, and 2/18/89.

On May 12, 1988, Respondent sent Lignowski a letter, the body of which reads:

Our records show that you have been a member of our organization but you were suspended from membership on December 1, 1983.

Suspended members are required to pay a reinstatement fee of \$155.00 plus all back dues accruing [sic] up to a maximum payment of \$550.00. Your actual indebtedness [sic] would exceed the \$550.00 so you would be required only to pay that maximum amount.

Under the provisions of our International Constitution, in cases where the cost of reinstatement exceeds the amount of the current initiation fee, the Local Union may accept such individuals as new members.

The current initiation fee is \$300.00 plus the current months' dues. In your case, this would be a total of \$336.50 including dues for the month of May 1988.

If you wish to re-enter the Local Union as a new member, please complete and return the enclosed Application for Membership.

Please call our Dues Office or your Business Representative, Brian Reive, if you have any questions concerning this matter.

Shortly after Lignowski commenced working for CMP he visited Respondent's office to make arrangements for reinstatement into membership. It is unclear whether this visit was shortly before or shortly after he received the May 12 letter. In any event, Lorraine Metcalf, Respondent's dues department clerk, explained to him the two options for regaining status as a member in good standing which were reflected in the May 12 letter. Lignowski chose the more expensive option of reinstatement believing that by doing so he would retain some sort of seniority for the out-of-work list which would not be available to him if he chose the option of joining as a new member. Thereafter, by checks dated June 15 and July 21, 1988, Lignowski made payments to the Union in the amount of \$300 toward his reinstatement fee. Lignowski heard nothing further from the Union until November 1988 nor was he given any deadline for completing payment of the reinstatement fee.

On November 30 Respondent sent Lignowski a letter the body of which reads:

As of this date, you have not completed payment of your reinstatement indebtedness. Following is a breakdown of your account:

Reinstatement—Maximum Charge	\$550.00
April 1988 dues	11.00
May & June dues @ \$36.50 per month	73.00
July through November dues at \$37.60	188.00
	<hr/>
	\$822.00
LESS PAYMENTS THRU 10/20/88	-521.00
	<hr/>
BAL. DUE THROUGH NOVEMBER 1988	\$301.00

We cannot report you to our International Union until full payment is made. We, therefore, request that you complete the balance of your indebtedness by no later than December 22, 1988.

If you have any questions concerning this matter, please contact our Dues Department.

Thereafter, according to Lignowski, he telephoned Metcalf and protested that his dues had been paid. After a slight delay, Metcalf returned to the telephone and informed Lignowski that according to her records the November 30 letter was an accurate indication of his indebtedness. Lignowski asked to speak to a business agent and left his telephone number when he was told that no business agent was in the office.

It is undisputed that Lignowski still owed a portion of the required reinstatement fee. Nevertheless, he neither paid the balance of the reinstatement fee nor did he attempt to make any arrangements to do so. On February 7 or 8 he received another letter from Respondent dated February 6, 1989,¹ the body of which reads:

You still have not completed your indebtedness to reinstate your membership.

On November 6, 1988 we advised you of this fact, copy of letter enclosed, and the amount of your indebtedness through the month of November 1988. Since that date, we have received a total of \$74.00 and, of course, your December 1988, January and February 1989 dues have become due and payable.

You now owe the following:

	LESS PAYMENTS:		
12/1/88	\$37.00		
12/29/88	37.00	-\$74.00	\$227.00
	<hr/>		
	PLUS DUES:		
Dec. 1988	\$37.60		
Jan. 1989	37.60		
Feb. 1989	37.60	\$112.80	
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TOTAL AMOUNT DUE THROUGH FEBRUARY 1989 \$339.80

You are requested to pay the full amount of \$339.80 to complete your reinstatement and dues through February 1989 by no later than the close of business at 5:00 P.M. on Tuesday, February 21, 1989, or it will be necessary to notify your Employer that you are not in good standing and request that you be removed from the job.

If you have any questions regarding this subject matter, you should contact your Business Representative, Brian Reive.

After receiving this letter Lignowski again spoke with Metcalf by telephone. He protested that the amount owed as set forth in the February 6 letter was incorrect. Metcalf said it was correct according to her records and told him he would have to speak to a business representative. According to Lignowski, he left his phone number for a business representative to get in touch with him, but he never heard from anyone. According to him, he also went to the union offices,

¹ All dates hereinafter will be in 1989 unless otherwise indicated.

told Metcalf he needed more time since he was in bankruptcy and asked to speak to a business agent or the business manager.

On February 27, Respondent sent a letter to CMP requesting Lignowski's termination. The body of that letter reads:

Mr. Vince Lignowski has failed to tender the periodic dues and fees uniformly required as a condition of maintaining membership in good standing in Local 501.

We have previously notified him of his delinquency including a detailed account of his indebtedness. He has requested to pay his indebtedness by February 21, 1989, and he has failed to meet that deadline.

We are hereby requesting that you terminate Mr. Lignowski on Tuesday, March 7, 1989, for his failure to comply with the provisions of the Collective Bargaining Agreement by maintaining membership in good standing in our organization.

Should Mr. Lignowski pay his total indebtedness prior to the close of business at 5:00 P.M., Monday, March 6, 1989, you will be so notified.

If you have any questions concerning this matter, please contact the undersigned.

At some point prior to March 6 Lignowski spoke with Metcalf and told her he would like to speak to a business agent to try to get an extension until he received his paycheck; that he would receive his paycheck on March 7 and wanted to extend the deadline until March 10 to give him enough time to cash the check and pay his indebtedness. Metcalf said that she could not grant an extension. According to Lignowski, between November 10 and March 6 he called the Union approximately 10 times and left messages requesting a business agent to return his call. During that period he had an answering machine at his residence which was in good working order. Nevertheless, he never received a telephone call from a business agent and the only message on his answering machine from a business agent was after his termination. That message stated that Brian Reive had no power to extend the time for the payment of his indebtedness.

On March 9 or 10, Lignowski went to Respondent's office and again spoke to Metcalf. He told her he wanted to pay the reinstatement fee. Metcalf asked if he was sure he wanted to pay this since he had been terminated. Lignowski said yes, he wanted to pay it. He did pay the balance of his indebtedness. He also asked Metcalf to seek his reinstatement to his job with CMP. Metcalf said she did not have the power to do that.

By letter dated March 7 CMP notified Lignowski that he was terminated. The body of that letter reads:

In accordance with instructions issued by International Union of Operating Engineers, Local 501, you are hereby terminated.

We made an effort to contact you by phone without success.

Please return all uniforms in your custody and pick up your final check at the office.

On March 9, Metcalf advised CMP by telephone that Lignowski had paid his indebtedness. Fred Erdtsieck, controller and employee relations director for CMP, testified that

at some point after Lignowski's termination Respondent's business manager telephoned him and requested that Lignowski be rehired. Erdtsieck said, "No." According to Erdtsieck, the reason he said no was that Lignowski had been issued two letters of warning and Erdtsieck had already spoken to the plant manager and Lignowski's supervisor and, based on his record, they did not want to rehire him.

IV. CONCLUSIONS

It is well established that a union has a fiduciary duty to deal fairly with the employees in seeking to enforce a union-security provision which requires that it notify employees of their contractual obligation to maintain membership in good standing before it commences any adverse action against them. *NLRB v. Hotel & Restaurant Employees Local 568 (Philadelphia Sheraton)*, 320 F.2d 254, 258 (1963), *enfd.* 136 NLRB 888 (1962). This duty includes, at the very least, an obligation to give "reasonable notice of the delinquency, including a statement of the precise amount and months for which dues were owed, as well as an explanation of the method used in computing such amount." *Teamsters Local 122 (August A. Busch & Co.)*, 203 NLRB 1041, 1041-1042 (1973). See also *Operating Engineers Local 545 (Joseph Saraceno & Sons)*, 161 NLRB 1114, 1119-1121 (1966); and *Teamsters Local 291*, 236 NLRB 1100, 1105-1106 (1978). The Union must also inform the employees when payments are to be made and that discharge will result from the failure to pay the amount owed. A showing of a causal connection between the failure to give notice and the employees' non-payment is not required. *Teamsters Local 150 (Delta Lines)*, 242 NLRB 454 (1979); *Distillery Workers Local 38 (Schenley Distillers)*, 242 NLRB 370 (1979), *enfd.* 642 F.2d 185 (6th Cir. 1981). *Communications Workers Local 9509 (Pacific Bell)*, 295 NLRB 196 (1989).

Here Lignowski has assumed the obligation to pay a reinstatement fee of \$550, even though the initiation fees uniformly required of new employees of California Milk Producers is only \$300. It is undisputed that Lignowski paid \$300 in addition to the \$369 deducted from his paycheck for union dues. Hence, a critical question is whether the Union can lawfully cause his discharge for failure to pay a voluntarily assumed obligation in excess of the initiation fee uniformly required of other new hires.

Respondent would answer in the affirmative. Thus, Respondent argues, once Lignowski made the choice to pay a reinstatement fee, Respondent had no authority to switch his payments on such fee to payments on an initiation fee. I find this argument unpersuasive. Despite any agreement between Lignowski and Respondent, the law is clear. Payment of back dues for a period when there was no contractual obligation to maintain union membership cannot be lawfully imposed as a condition of employment. Here not only does the \$550 reinstatement fee exceed the amount of the uniformly required initiation fee, \$395 of the reinstatement fee is specifically characterized as back dues for periods during which there was no contractual obligation that Lignowski maintain union membership. To demand his discharge for failure to pay such fees is clearly unlawful. Further, even assuming, *arguendo*, that Respondent could not apply the reinstatement payments to an initiation fee, Respondent's duty to treat employees fairly imposed an obligation to notify Lignowski specifically that absent a full payment of the voluntarily as-

sumed reinstatement fee, he was obligated, under the contract, to pay the \$300 initiation fee and that, on his request, his reinstatement fee payments could be applied toward such initiation fee. This Respondent failed to do. Respondent also unlawfully set forth as a condition of employment the payment of dues during the 30-day grace period following the commencement of Lignowski's employment. Actually, Lignowski was not in arrears as to his financial obligations to Respondent under the union-security clause. He was obligated to pay a \$300 initiation fee, \$36.50 dues for the month of June and \$37.60 a month for July through February, plus an undisclosed amount in dues for May 26 through 31. The total owed was \$637.30, plus a prorated amount for the 6 days in May. He actually paid \$669. Thus, he had paid an amount equal to the required initiation fee, dues for June through February, plus an additional \$32 which should be more than adequate to cover his dues obligations for the 6 days in May.

Accordingly, I find that by attempting to cause, and causing California Milk Producers to discharge Vince Lignowski, Respondent has violated Section 8(b)(1)(A) and (2) of the Act.

CONCLUSIONS OF LAW

1. Respondent is, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

2. California Milk Producers is, and has been at all times material, an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

3. Respondent violated Section 8(b)(1)(A) and (2) of the Act by causing California Milk Producers to discharge Vince Lignowski.

THE REMEDY

Having found that Respondent has engaged in unfair labor practices within the meaning of Section 8(b)(1)(A) and (2) of the Act, it is recommended that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent unlawfully caused California Milk Producers to discharge Vince Lignowski, it is recommended that Respondent notify California Milk Producers, in writing, with a copy to Lignowski, that it has no objection to the reinstatement of Lignowski, and that it requests Lignowski be reinstated. It is further recommended that Respondent make Lignowski whole for any losses he may have suffered by reason of the discrimination against him by payment to him of a sum of money equal to that which he would normally have earned from the date of his termination until he has been reinstated by California Milk Producers to his former or substantially equivalent job or he obtains substantially equivalent employment elsewhere, less his net interim earnings.² The amount of backpay shall be computed in the manner set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as provided in *Florida Steel Corp.*, 231 NLRB 651 (1977).

²See *Sheetmetal Workers Local 355 (Zinsco Electrical)*, 254 NLRB 773 (1977).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended³

ORDER

The Respondent, Operating Engineers, Local Union 501, International Union of Operating Engineers, AFL-CIO, Los Angeles, California, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Causing or attempting to cause California Milk Producers to discriminate against any of its employees in violation of Section 8(a)(3) of the Act.

(b) Enforcing the union-security clause of its collective-bargaining agreement with California Milk Producers in a manner so as to condition employment on the payment of dues and/or fees which may not lawfully be required as a condition of employment and/or without giving adequate prior notice to the employee whose discharge is sought.

(c) In any like or related manner restraining or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(a)(3) of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make Vince Lignowski whole for any loss of pay he may have suffered as a result of the discrimination against him in the manner set forth in the remedy section.

(b) Notify California Milk Producers, in writing, with a copy to Vince Lignowski, that it has no objection to the reinstatement of Vince Lignowski and request that he be reinstated.

(c) Remove from its records any reference to unlawful arrearages in payments of dues and fees and to the unlawful discharge of Vince Lignowski and notify him in writing that this has been done and that evidence of such alleged arrearage in dues and fees and of his unlawful discharge shall not be used as a basis of future action against him.

(d) Post at its union hall copies of the attached notice marked "Appendix."⁴ Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notice is not altered, defaced, or covered by any other material.

(e) Deliver to the Regional Director for Region 21 signed copies of the notice in sufficient numbers to be posted by California Milk Producers, in all places where notices to em-

³If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

⁴If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

employees are customarily posted, if it is willing. Ask the Employer to remove any reference to Vince Lignowski's unlawful discharge from the Employer's files and notify Lignowski that it has asked the Employer to do this.

(f) Notify the Regional Director in writing within 21 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT cause or attempt to cause California Milk Producers to discriminate against any of its employees in violation of Section 8(a)(3) of the Act.

WE WILL NOT enforce the union-security clause of our collective-bargaining agreement with California Milk Producers in a manner so as to condition employment on the payment of dues and/or fees which may not lawfully be required as a condition of employment and/or without giving adequate prior notice to an employee whose discharge is sought.

WE WILL NOT in any like or related manner restrain or coerce in the exercise of the rights guaranteed them by Section 7 of the Act, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(a)(3) of the Act.

WE WILL make Vince Lignowski whole for any loss of pay he may have suffered as a result of our discrimination against him, with interest, until he has been reinstated by California Milk Producers, or obtains substantially equivalent employment elsewhere.

WE WILL notify California Milk Producers, in writing, with a copy to Vince Lignowski, that we have no objection to the reinstatement of Vince Lignowski and WE WILL request that he be reinstated.

WE WILL remove from our records any reference to alleged arrearages in payments of dues and fees by Vince Lignowski and to his unlawful discharge, and notify him, in writing, that this has been done and that evidence of such alleged arrearage in dues and fees and of his unlawful discharge shall not be used as a basis for future action against him.

OPERATING ENGINEERS LOCAL UNION 501,
INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO